

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FD 35496

PETITION FOR DECLARATORY ORDER

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, INC.
D/B/A DENVER & RIO GRANDE RAILROAD, LLC**

**JOINT MOTION TO STRIKE AND REPLY OF
THE CITY OF MONTE VISTA, CO,
AND THE SAN LUIS & RIO GRANDE RAILROAD
TO ERIC STROHMEYER'S
NOTICE OF INTENT AND COMMENTS**

Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Due: October 20, 2014

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**I.
INTRODUCTION**

The City of Monte Vista and the San Luis & Rio Grande Railroad¹ submit this Joint Motion to Strike and Reply to the “Notice of Intent to Participate with Comments” (“the Notice”) filed with the Surface Transportation Board (“the Board”) by Eric Strohmeyer on September 30, 2014. Mr. Strohmeyer had sought an extension until October 20² to file a verified statement in support of the Petition for Reconsideration that Denver & Rio Grande Railway Historical Foundation

¹ Hereafter “Respondents” or the “City” and “SLRG” individually.

² Which the Board granted in a late decision served on October 16, 2014.

d/b/a Denver & Rio Grande Railroad, LLC (“DRGRHF”) had previously filed in this proceeding on September 8.

Respondents view the Notice as a thinly veiled attempt by Mr. Strohmeyer to resurrect the trackage rights request that he and James Riffin had previously submitted and which the Board had denied on January 11, 2013.³ The Board should not allow Mr. Strohmeyer to participate in the subject reconsideration proceeding in his independent capacity as he does not have standing. He is a business partner of the reconsideration petitioner, DRGRHF, and is not a rail carrier operating on or near the rail line that is the subject of this proceeding. Nor is Mr. Strohmeyer a railroad customer, an adjacent landowner, an affected political subdivision, an affected local citizen, or railroad employee. Accordingly, the Board should strike the tendered Notice. If the Board denies this Motion, Respondents request that the Board accept this Reply.

II. BACKGROUND

The facts of this dispute are well known and need only be repeated for the sake of clarity. This proceeding involves DRGRHF’s continuing attempts to obtain a Board ruling that “railroad-related” activities it allegedly conducts on property located in the City of Monte Vista preempt a City zoning ordinance. That

³ *James Riffin and Eric Strohmeyer-Acquisition and Operation Exemption-In Rio Grande and Mineral Counties, Colo*, FD 35705. The United States Court of Appeals upheld that ruling in an order served on December 30, 2013, and rehearing was denied on March 25, 2014.

ordinance forbids the storage of railcars on property not connected to a rail line.⁴ DRGRHF claims that its activities consisting of storing and maintaining railroad parts and equipment support excursion passenger operations it conducts on its own line some 30 miles west of Monte Vista. The subject parcel is adjacent to but not attached to SLRG's line that extends between the connection with DRGRHF at Derrick (near South Fork) and Walsenburg, CO.

After a Colorado court found that DRGRHF's owner Donald Shank had violated the City's ordinance, DRGRHF asked the Board to rule that its activities "as a rail carrier" on the property preempted the City's ordinance. The Board had previously held in its decision served August 18 that DRGRHF's service did not constitute transportation under the ICC Termination Act ("ICCTA") and was not entitled to preemption from the City ordinance.

On September 30,⁵ Mr. Strohmeyer submitted two documents to the Board. The first is a letter requesting the October 20 extension accompanied by an initial version of a pleading entitled "Notice of Intent to Participate with Comments." The second is a transmittal letter attaching a revised "Notice of Intent to Participate with Comments." The Board granted the extension request in a late decision served October 16 but limited his testimony to appearing in his capacity as DRGRHF's Director of Freight Service.

⁴ Monte Vista Municipal Code §12-17-110(3).

⁵ Dated September 29 but treated as filed on September 30.

III. ARGUMENT

1. Motion to Strike

The Board's rules at 49 CFR §1104.8 govern requests to strike objectionable matter on various grounds including redundancy and irrelevance. Board procedures contemplate that pleadings contain a party's "case-in-chief" so as to discourage the practice of "dribbling" out a party's case in bits and pieces.

Burlington Northern and Santa Fe Railway Company-Acquisition and Operation Exemption-State of South Dakota, FD 34645, slip op. at 3, STB served Jan. 14, 2005. Mr. Strohmeyer claims that he is participating here both as the newly anointed Director of Freight Service for the Foundation (i.e, the DRGRHF) and in his individual capacity as well.

All of the tendered documents should be stricken. As noted above, Mr. Strohmeyer is a business associate of the Petitioner, DRGRHF, and therefore has no independent right to submit comments, evidence, and arguments. He is not an affected railroad, railroad customer, landowner, political subdivision, local citizen, or railroad employee and therefore lacks standing to participate. To the extent that Mr. Strohmeyer is even entitled to participate, he should have submitted any supporting verified statement with DRGRHF's Petition for Reconsideration on September 8. If he has any independent basis for participation, it would be as an

amicus and that status would not entitle him to seek judicial review of any adverse Board ruling on reconsideration.

Should the Board deny this Motion, Respondents respectfully request the opportunity to submit this Reply. The Board customarily allows a “reply to a reply” when necessary to ensure a complete record. *See, City of Alexandria, Va.—Petition for Declaratory Order*, FD 35157, STB served Nov. 6, 2008 (allowing reply to reply “[i]n the interest of compiling a full record”). This is such a case. Although the Board appears to recognize Mr. Strohmeyer’s limited right to participate, Respondents are submitting this Reply out of an abundance of caution.

2. Reply

Respondents view Strohmeyer’s pleadings as an attempt to resurrect the Strohmeyer/Riffin trackage rights request previously rejected by the Board in FD 35705. Inasmuch as neither of these applicants could establish a genuine business purpose for the trackage rights, Respondents believe that the filing was made in an attempt to bolster DRGRHF’s preemption request.

Mr. Strohmeyer’s claims that (1) this case is virtually identical to a request by James Riffin to secure a preemption ruling on certain property he owns in the State of Maryland where the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Board’s decision,⁵ (2) the Board’s

⁵ *Riffin v. Surface Transportation Board*, 592 F.3d 195 (D.C. Cir. 2010).

ruling here is contrary to a 1970 Supreme Court decision in *Pike v. Bruce Church*,⁶ and (3) the Board's August 18 ruling is arbitrary and capricious because it failed to explain its decision denying preemption, provide a rational explanation for its departure from precedent, and acknowledge the substantial evidence in the record. Citing these two decisions, Mr. Strohmeyer argues DRGRHF's Monte Vista facility is entitled to preemption despite the fact that it supports a "railroad" operation many miles away.

Strohmeyer's assertions miss the point of the Board's decision. Were DRGRHF actually conducting *common carrier railroad operations* on its own line, it might be able to claim preemption for the Monte Vista facility *provided* that facility was connected to his line between Derrick and Creede by some form of trackage or operating rights over SLRG's line. *Suffolk & Southern Rail Road, LLC-Lease and Operation Exemption*, FD 35036, STB served December 20, 2007 (rejecting the idea that a disconnected rail facility is entitled to preemption absent some ability or rights on the part of the entity claiming preemption to reach its existing common carrier railroad operations). But DRGRHF has not sought trackage or haulage rights over SLRG's line and SLRG has no intention of granting them.

⁶ 397 U.S. 137.

More significantly, DRGRHF is not conducting common carrier railroad service on its own lines despite representations to the contrary. As Respondents have previously pointed out, DRGRHF's line is incapable of handling modern day locomotives and cars used by railroads in common carrier service, it owns no equipment that is currently capable of providing common carrier railroad service, and it has no interchange agreement with SLRG or Union Pacific Railroad or BNSF Railway (at Walsenburg). Furthermore, in the 15 years that DRGRHF has owned the Creede Branch, it has not interlined any traffic with SLRG or any other carrier. By DRGRHF's own admission, the only "freight" handled to date as consisted of rafts moving in intrastate commerce. As best Respondents can fathom, there is no evidence of industrial activity or marketing being conducted on or about the Derrick to Creede line. All that we have here is an excursion service being provided with former railroad maintenance vehicles that have been outfitted with chairs for passengers.

Mr. Strohmeier makes much of the fact that many short line railroads including two owned by SLRG's corporate parent, Iowa Pacific Holdings, operate excursion passenger service and are still entitled to preemption. But that's where Mr. Strohmeier's comparison ends. As Iowa Pacific's president Edwin Ellis states in the attached verified statement, each of the two Iowa Pacific carriers identified by Mr. Strohmeier, Saratoga & North Creek Railway in New York and the Santa

Cruz & Monterey Bay Railway in California, were acquired for the purpose of providing freight service. In fact, Warren County and the town of Corinth, NY, which own part of the line over which Saratoga & North Creek operates, selected this carrier to replace a former lessee operator because Saratoga proposed to reinstate freight service. Saratoga's passenger service (connecting with Amtrak for service to points throughout the United States) provided an initial source of revenue while Saratoga is developing its freight business. The Line has since handled freight traffic which has been interchanged with CP Rail at Saratoga Springs, NY. Similarly, Iowa Pacific is handling substantial freight carloads on the Santa Cruz & Monterey Bay.⁷ Ellis VS para. 4.

Each of these two railroads can handle modern freight railroad equipment, use motive power common to short line railroad operations, have interchange and commercial agreements with their connecting Class I railroads, are currently moving some freight, and publish tariffs. Finally, SLRG notes that Iowa Pacific has had a long (12 year) history of acquiring marginal railroad lines, rebuilding them to a class I or better track condition, and turning them into profitable freight operations. DRGRHF cannot claim to have done that. Ellis VS para. 5.

⁷ The Line is owned by the Santa Cruz County Regional Transportation Commission and leased to Santa Cruz & Monterey Bay which holds a rail operating easement acquired from the Union Pacific Railroad.

IV.
CONCLUSION

The Board should strike his “Notice” as Mr. Strohmeyer lacks standing to participate in this proceeding. If the Board denies this Motion, Respondents request that the Board accept this Reply. Moreover, Respondents will file a Reply to Mr. Strohmeyer’s Verified Statement on or before October 30 in keeping with the Board’s decision granting that extension.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Due: October 20, 2014

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of the foregoing Joint Motion to Strike and Reply of the San Luis & Rio Grande Railroad and the City of Monte Vista, CO, to the “Notice of Intent to Participate with Comments”

filed by Eric Strohmeyer to the following parties by US Mail and electronic mail,
this 20th day of October 2014:

Donald Shank
Executive Director
P.O. Box 1280
South Fork, CO 81154

Eugene L. Farish, Esq.
Law Office of Eugene L. Farish, PC
739 1st Avenue
Monte Vista, CO 81144

Eric Strohmeyer
c/o CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

/s/ John D. Heffner

John D. Heffner

VERIFIED STATEMENT
OF
EDWIN E. ELLIS

Edwin E. Ellis, being duly deposed and sworn, states as follows.

1. My name is Edwin E. Ellis. My business address is 118 South Clinton Street, Suite 400, Chicago, IL 60661. I am President and Chief Executive Officer of Iowa Pacific Holdings, LLC (“Iowa Pacific”), a short line railroad holding company. I am submitting this statement in support of the Joint Motion to Strike and Reply filed by Iowa Pacific’s subsidiary the San Luis & Rio Grande Railroad and the City of Monte Vista, CO (“the City”), in response to a filing made by Eric Strohmeyer in STB proceeding FD 35496. That case involves efforts by the Denver & Rio Grande Railway Historical Foundation, Inc. (“DRGRHF”), to obtain a ruling from the Surface Transportation Board that certain activities it conducts on its property in the City are eligible for federal preemption.

2. I am submitting this testimony to rebut certain allegations made by Mr. Strohmeyer to the effect that because many common carrier short line railroads both provide excursion passenger service and enjoy federal preemption from state and local laws, the activities that DRGRHF performs on its Monte Vista property in support of its excursion service are likewise eligible for federal preemption. Mr. Strohmeyer is wrong.

3. Either directly or through its wholly owned subsidiary, Permian Basin Railways, Iowa Pacific owns and operates nine STB-licensed common carrier short line railroads in the United States. These carriers provide freight service in New York, Massachusetts, Illinois, Colorado, Texas, New Mexico, Oregon, and California. Several of these companies also provide passenger service as well. Finally Iowa Pacific owns another subsidiary, The Pullman Sleeping Car Company, LLC, which provides a regularly scheduled specialized passenger service between Chicago and New Orleans in the consist of Amtrak's *City of New Orleans*. Inasmuch as I also serve as Chairman of the Passenger Rail Committee of the American Short Line and Regional Railroad Association, I believe I am qualified to discuss the extent of passenger rail activity in the short line railroad industry in the United States.

4. Mr. Strohmeyer makes much of the fact that many short line railroads including two owned by Iowa Pacific, Saratoga & North Creek Railway ("Saratoga") and the Santa Cruz & Monterey Bay Railway ("Santa Cruz"), operate excursion passenger service and are still entitled to preemption. But that's where Mr. Strohmeyer's comparison ends. Iowa Pacific established each of these two carriers for the purpose of providing freight service. In fact, Warren County and the town of Corinth, NY, which own part of the line over which Saratoga operates, selected this carrier to replace a former lessee operator because Saratoga proposed

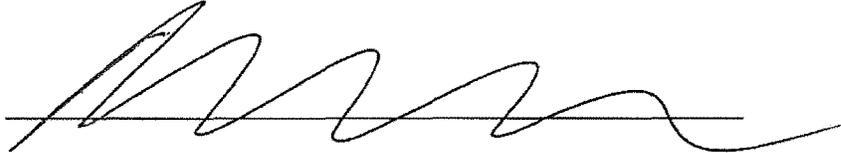
to reinstate freight service. Saratoga's passenger service (connecting with Amtrak for service to points throughout the United States) provided an initial source of revenue while Saratoga develops its freight business. The line has since handled freight traffic which has been interchanged with CP Rail at Saratoga Springs, NY. Similarly, Iowa Pacific is handling substantial freight carloads on the Santa Cruz and Monterey Bay.

5. Each of these two railroads can handle modern freight railroad equipment, uses motive power common to short line railroad operations, has interchange and commercial agreements with their connecting Class I railroads, is currently moving some freight, and publishes tariffs. Finally, I note that Iowa Pacific has had a long (12 year) history of acquiring marginal railroad lines, rebuilding them to a class I or better track condition, and turning them into profitable freight operations. DRGRHF cannot claim to have done that.

VERIFICATION

STATE OF Illinois)
)
CITY OF Cook)

Edwin E. Ellis, being duly sworn according to law, hereby deposes and states that (s)he holds the position of President and Chief Executive Officer with Respondent, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.



Subscribed to and sworn to before me, a Notary Public, in and for the County of Cook in the State of Illinois, this 17 day of October 2014.

Judith A Hogan
Notary Public

My Commission expires: Jan 13, 2017

